Editor's note: 79 I.D. 689 (not in I.D. format in IBLA volume); Appealed -- aff'd in part, remanded in part, Civ.No. 73-129-S (S.D.Calif. May 14, 1974); For action on remand see US v. O'Callaghan 29 IBLA 333.

UNITED STATES
v.
LLOYD O'CALLAGHAN, SR. ET AL.

IBLA 71-203 Decided December 8, 1972

Appeal from decision (California Contests No. R-04844 and R-04845) of Administrative Law Judge 1/ Graydon E. Holt, declaring the Coyote Clay No. 3 and Coyote Clay No. 4, and the Bolsa De Oro No. 5 placer mining claims null and void.

Affirmed.

Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Discovery: Generally

The Board will uphold the conclusion of an Administrative Law Judge that where a placer mining claim, located after July 23, 1955, contains common varieties of sand, gravel, and clay and also deposits of metalliferous minerals including gold, silver, and mercury, the locatable minerals must support a discovery without consideration of the economic value of non-locatable deposits.

Mining Claims: Discovery: Generally

A clay deposit is not locatable under the mining laws, though sold for use as an additive in cattle feed, where it is not shown that the clay possesses characteristics which give it an unusual value distinguishing it from common clays.

Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Discovery: Marketability

Since Congress withdrew common varieties of sand and gravel from location under the mining laws by the Act of July 23, 1955, 30 U.S.C. § 611 (1970), it is incumbent upon one who

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1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

located a claim prior thereto to show that all the requirements for a discovery -- including that the materials could have been extracted, removed, and marketed at a profit -- had been met by that date.

Mining Claims: Common Varieties of Minerals: Unique Property

A deposit of sand and gravel, without a unique property which gives it a special value, cannot be determined to be an uncommon variety solely on the basis of its location, even though the location gives the deposit an economic advantage due to its proximity to market.

Mining Claims: Discovery: Marketability

The fact that nothing is done toward the development of a mining claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them.

Mining Claims: Discovery: Marketability

The holding of a mining claim as a reserve of sand and gravel for future development without present marketability does not impart validity to the claim.

Mining Claims: Contests -- Rules of Practice: Hearings

Appellant's request for an opportunity to obtain new evidence for a further hearing in a mining claim contest will be denied where there has been no tender of proof which would tend to establish a valid discovery.

APPEARANCES: Wien, Thorpe and Sutherland of El Centro, California, by Lowell F. Sutherland, Esq., for appellants; George H. Wheatley, Esq., Office of the Solicitor, Department of the Interior for the United States.

OPINION BY MR. GOSS

Lloyd O'Callaghan, Sr., William H. Raley, Lenore O'Connor, the Estate of Ross O'Callaghan, and Lowell F. Sutherland have appealed from a decision of an Administrative Law Judge dated January 23, 1971, declaring the Coyote Clay No. 3, and Coyote Clay No. 4, and the Bolsa De Oro No. 5 placer mining claims, situated in secs. 14 and 15, T. 16 S., R. 9 E., S.B.M., Imperial County, California, null and void.

Contest proceedings were originally initiated by the Riverside Land Office Manager, March 11, 1964, charging that: (a) the material found within the limits of the claim is not a valuable mineral deposit under section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1970); (b) valuable minerals have not been found within the limits of the claim so as to constitute a valid discovery within the meaning of the mining law.

A hearing, originally begun in El Centro, California, March 23, 1967, was recessed to permit the parties to secure additional joint samples of mercury from the claims, and was subsequently reconvened April 9, 1970. After evidence was received and testimony given on behalf of all parties, the Judge issued his decision declaring the three placer mining claims null and void for the lack of a timely discovery of a locatable mineral deposit. He found (1) that the sand and gravel deposit on all three claims is a common variety which was excluded from location under the mining laws on July 23, 1955; (2) on the two Coyote claims located after that date the sand and gravel therefore cannot be considered as a locatable mineral; (3) the tertiary clays found on the claims are common clays not subject to location under the mining laws; and (4) there has not been a discovery of a valuable gold, silver or mercury deposit on any of the claims.

Appellants challenged the findings, raising on appeal essentially the same arguments which were discussed at length in the Judge's decision.

We have reviewed the record and considered the decision of the Judge, which summarizes the evidence and discusses in detail the points raised by appellants. The facts of the case and the discussion of the applicable law are set forth in the decision below, a copy of which is attached. We conclude that the Judge's decision and findings are correct. Accordingly, we adopt the decision as the decision of this Board. Several points raised on appeal require additional comment.

As to the sand and gravel on Coyote Nos. 3 and 4, in effect appellants contend that sand and gravel used for road construction purposes is not a common variety under the Act of July 23, 1955. It has not, however, been shown that the material has any unique property giving it a special value. The fact that it meets ordinary construction requirements does not make it unique. A deposit of otherwise common sand and gravel in an area where assertedly good quality sand and gravel is scarce does not make it an "uncommon variety", since scarcity is not a unique property inherent in the deposit but is

only an extrinsic factor. United States v. Neil Stewart, 5 IBLA 39, 79 I.D. 27 (1972).

Appellants further contend that the Judge erred in applying the requirements of the Act of July 23, 1955, supra, to the Bolsa De Oro No. 5 claim, since he found that the claim was located prior to the date of that Act. We find no merit in this argument.

It is incumbent upon one who asserts location of a claim for common varieties of sand and gravel prior to July 23, 1955, to prove by a preponderance of evidence that all the requirements for a discovery -- including that the materials could have been extracted, removed, and marketed at a profit -- had been met by that date. Palmer v. Dredge Corporation, 398 F.2d 791 (9th Cir. 1968), cert. denied 393 U.S. 1066 (1969); Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971). No such evidence was introduced as to the Bolsa De Ora, nor was evidence presented as to any attempted development. In United States v. Neil Stewart, supra, 79 I.D. 33-35, the presumption of non-marketability is discussed:

> An actual history of development of a claim prior to July 23, 1955, is not essential in order to meet the requirement of marketability.
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> As we pointed out in United States v. E. A. Barrows, supra [76 I.D. 299 (1969), aff'd, 447 F.2d 80 (9th Cir. 1971)] at 306:
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> > * * * [W]hile the fact that no sale had been made at the critical time is not controlling in itself, the fact that nothing is done toward the development of a claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them. See United States v. Everett Foster et al., 65 I.D. 1 (1958), affirmed in Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); * * *.
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> We find that the appellant's evidence is insufficient to establish that the material from his claims

> could have been marketed at a profit prior to July 23, 1955. The appellant has failed to prove the existence of a demand for the material as of that date from these claims.
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> The Department has already held that the holding of a mining claim as a reserve of sand and gravel for future development without present marketability does not impart validity to the claim.

A discovery of a valuable sand and gravel deposit on the Bolsa De Oro claim prior to July 23, 1955, was not proved. After that date, the sand and gravel on the claim was properly classed as a common variety excluded from location under the mining laws.

As to the clay deposits on the three claims, ordinary clay does not warrant that the land be classified as mineral. Dunluce Placer Mine, 6 L.D. 761 (1888). Neither is ordinary clay locatable. Holman, et al. v. State of Utah, 41 I.D. 314 (1912). The status of common clay was not changed by the Act of July 23, 1955. Appellants herein have not shown what elements make the clay distinguishable from other common clays. Dr. Verne Medel testified that the exact minerals which were of value as an additive in cattle feed were not known, but that certain montmorillonite clay was of value. Montmorillonite is one of the most common of the types of clay. See the definition of "clay mineral" in U.S. BUREAU OF MINES DICTIONARY OF MINING MINERAL AND RELATED TERMS (1968 ed. at page 215):

> clay mineral. * * * The most common clay minerals belong to the kaolinite, montmorillonite, attapulgite, and illite (or hydromica) groups. * * *

It has not been shown what the difference is, if any, between the clay herein concerned and common montmorillonite. The clay found on the claims differs from that used in Dr. Medel's experiments. Appellant O'Callaghan testified: (1) that some of the cattle feeders required that sea shells be mixed with the clay from the claims in order to increase the calcium carbonate; (2) that the royalty received for the clay was $ .50 per ton; (3) that the clay in question did not contain arsenic; and (4) that other clay in the area did. It was not shown that the large quantities of montmorillonite throughout the United States ordinarily contain arsenic, nor does the definition of montmorillonite in the U.S. Bureau of Mines

"Dictionary of Mining Mineral and Related Terms," 1968 Edition so indicate.

In Holman, et al. v. State of Utah, supra, the question of whether clay was a mineral and subject to location was considered:

> It is not the understanding of the Department that Congress has intended that lands shall be withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country. * * * The term * * * [mineral] in the public-land laws is properly confined to land containing materials such as metals, metalliferous ores, phosphates, nitrates, oils, etc., of unusual or exceptional value as compared with the great mass of the earth's substance. It is not intended hereby to rule that there may not be deposits of clay and limestone of such exceptional nature as to warrant entry of the lands containing such deposits under the mining laws.

The burden of proving the nature and unusual value of the clay is upon the contestees. A clay deposit -- though sold for use as an additive in cattle feed -- is not locatable under the mining laws where it has not been shown that the clay possesses characteristics which gives it an unusual value distinguishing it from common clays, so that it can be marketed profitably for commercial purposes for which common clay cannot be sold. United States v. Glen S. Gunn, et al., 7 IBLA 237, 79 I.D. _____ (1972).

Appellants' motion, to take and submit as new evidence additional samples of mercury to be obtained by deep borings, is denied. To warrant a new hearing, there should be a tender of proof which would tend to establish that there had been a valid discovery. United States v. Clarence T. Stevens and Mary D. Stevens, 77 I.D. 97, 105 (1970). Appellants have shown no conclusive reason why evidence of any discovery was not presented at the first hearing. The request on appeal is in effect a request for additional time in which to make their original discovery.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joseph W. Goss, Member

We concur:

Frederick Fishman, Member

Joan B. Thompson, Member.